Juraimi bin Husin v Pardons Board, State of Pahang & Ors

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 1 OF 2001(W)
WAN ADNAN PCA, AHMAD FAIRUZ CJ (MALAYA), SITI NORMA YAAKOB, HAIDAR FCJJ AND DENIS ONG JCA
4 FEBRUARY 2002

Administrative Law *— Judicial remedies — Judicial review — Plaintiff's petition for clemency to the Sultan of Pahang rejected — Whether decision making process of the decision by the Sultan of Pahang justiciable — Whether making decision making process justiciable would have the same effect as having the decision itself justiciable — Federal Constitution art 42, Laws of the Constitution of Pahang art 15*

Constitutional Law *— Remedies — Prerogative of mercy — Judicial review — Plaintiff's petition for clemency to the Sultan of Pahang rejected — Whether decision making process of the decision by the Sultan of Pahang justiciable — Whether making decision making process justiciable would have the same effect as having the decision itself justiciable — Federal Constitution art 42, Laws of the Constitution of Pahang art 15*

The plaintiff, together with two others, had been convicted of murder and sentenced to death by the High Court at Temerloh. His appeal to the Court of Appeal and the Federal Court had been dismissed. On 30 June 1999, he petitioned for clemency to the Sultan of Pahang. His petition was rejected on 4 April 2001. By way of an originating summons filed in the High Court at Kuala Lumpur, the plaintiff applied for several declaratory orders pertaining to the rejection of the clemency petition. Meanwhile, the defendants applied under O 18 r 19 of the Rules of the High Court 1980 for the originating summons to be dismissed on the ground that the decision of the Pardons Board was not justiciable. During the hearing of the defendants' application, the plaintiff's counsel urged the court to remit the matter to the Federal Court under s 84 of the Courts of Judicature Act 1964 ('the CJA') for the Federal Court to decide on the constitutional issues raised. The High Court, however, dismissed the plaintiff's application. On appeal to the Court of Appeal, the Court of Appeal allowed the plaintiff's appeal and ordered the hearing of the originating summons in the High Court to be stayed and directed the High Court to remit to the Federal Court the question of whether the decision making process of the decision by the Sultan of Pahang under art 15 of the Laws of the Constitution of Pahang, read together with art 42 of the Federal Constitution, was justiciable. Counsel for the plaintiff stated that although there could be no judicial review or justiciability of the decision of the Pardons Board on the merits, the decision making process resorted to by the Board could be examined to consider whether it was in line with the spirit of the relevant constitutional provisions. According to counsel for the plaintiff, the inordinate delay between the presentation of the clemency petition and the decision making process leading to the rejection of the said

petition amounted to a contravention of arts 5(1), 42(4)(b) and (8) and s 38 in the 11th Sch of the Federal Constitution.

Held:

(1) In stating that the power under art 42 of the Federal Constitution was not susceptible or amenable to judicial review, the Supreme Court in *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 was then relying on the decision of the House of Lords in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935. The Supreme Court and the House of Lords had referred to this power under art 42 as the prerogative of mercy. The prerogative of mercy was amongst the powers that was not susceptible to judicial review because its nature and subject matter was such as not to be amenable to the judicial process (see p 537A–B); *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935 and *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 followed.

(2) The effect of making the decision making process justiciable would have the same effect as having the decision itself justiciable. Consequently, any attempt to make the decision making process justiciable would indirectly make the decision itself justiciable. Accordingly, the decision making process of the decision by the Sultan of Pahang under art 15 of the Laws of the Constitution of Pahang, read together with art 42 of the Federal Constitution, was not justiciable (see pp 533D, 537F–G).

[Bahasa Malaysia summary

Plaintif, bersama dua orang lain, telah disabit atas kesalahan membunuh dan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi di Temerloh. Rayuan beliau kepada Mahkamah Rayuan dan Mahkamah Persekutuan telah ditolak. Pada 30 Jun 1999, plaintif telah mengemukakan rayuan memohon belas kasihan kepada Sultan Pahang. Petisyen beliau ditolak pada 4 April 2001. Melalui satu saman pemula yang difailkan di Mahkamah Tinggi Kuala Lumpur, plaintif memohon pelbagai perintah perisytiharan berkaitan penolakan petisyen memohon belas kasihan. Sementara itu, defendan-defendan memohon di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 agar saman pemula ditolak atas alasan bahawa keputusan Lembaga Pengampunan tidak boleh diadili. Semasa pembicaraan permohonan defendan-defendan, peguam plaintif menyeru mahkamah supaya meremit perkara tersebut ke Mahkamah Persekutuan di bawah s 84 Akta Mahkamah Kehakiman 1964 ('AMK') untuk Mahkamah Persekutuan membuat keputusan atas isu-isu berkenaan perlembagaan yang dibangkitkan. Walau bagaimanapun, Mahkamah Tinggi menolak permohonan plaintif.

Atas rayuan kepada Mahkamah Rayuan, Mahkamah Rayuan membenarkan rayuan plaintif dan memerintah supaya pembicaraan saman pemula di Mahkamah Tinggi digantung dan mengarah Mahkamah Tinggi meremit ke Mahkamah Persekutuan persoalan sama ada proses membuat keputusan berhubung dengan keputusan oleh Sultan Pahang di bawah perkara 15 Undang-Undang Perlembagaan Pahang, dibaca bersama perkara 42 Perlembagaan Persekutuan, boleh diadili. Peguam bagi pihak plaintif menyatakan bahawa sungguhpun tiada persoalan tentang kajian semula kehakiman atau kebolehadilan berhubung dengan keputusan Lembaga Pengampunan di atas merit, proses membuat keputusan yang digunakan oleh Lembaga tersebut boleh diteliti untuk menimbang sama ada ia selaras dengan hasrat peruntukan perlembagaan yang relevan. Menurut peguam bagi plaintif, kelewatan melampau di antara pengemukaan petisyen memohon belas kasihan dan proses membuat keputusan yang membawa kepada penolakan petisyen tersebut merupakan perlanggaran perkara-perkara 5(1), 42(4)(b) dan (8) dan s 38 dalam Jadual 11 Perlembagaan Persekutuan.

Diputuskan:

(1) Dalam menyatakan bahawa kuasa di bawah perkara 42 Perlembagaan Persekutuan tidak mudah terpengaruh oleh atau tertakluk kepada kajian semula kehakiman, Mahkamah Agung dalam *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 pada ketika itu bergantung kepada keputusan House of Lords dalam *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935. Mahkamah Agung dan House of Lords telah merujuk kepada kuasa ini di bawah perkara 42 sebagai prerogatif belas kasihan. Prerogatif belas kasihan adalah di antara kuasa-kuasa yang tidak mudah terpengaruh oleh kajian semula kehakiman kerana sifat dan isinya adalah sedemikian hinggakan tidak tertakluk kepada proses kehakiman (lihat ms 537A–B); *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935 dan *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 diikut.

(2) Kesan menjadikan proses membuat keputusan boleh diadili akan mempunyai kesan yang sama seolah-olah keputusan itu sendiri boleh diadili. Akibatnya, sebarang usaha untuk menjadikan proses membuat keputusan boleh diadili akan menjadikan keputusan itu sendiri boleh diadili secara tidak langsung. Oleh itu, proses membuat keputusan berkaitan keputusan oleh Duli Yang Maha Mulia Sultan Pahang di bawah perkara 15 Undang-Undang Perlembagaan Pahang, dibaca bersama perkara 42 Perlembagaan Persekutuan, tidak boleh diadili (lihat ms 533D, 537F–G).]

Notes

For cases on judicial review under judicial remedies, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 130–132.

For cases on judicial review under the prerogative of pardon, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 1721.

Cases referred to

Council of Civil Service Unions & Ors v Minister for the Civil Service [1984] 3 All ER 935 (folld)

Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64 (refd)

Kehar Singh v Union of India AIR 1989 SC 653 (refd)

PP v Soon Seng Sia Heng & Ors [1979] 2 MLJ 170 (refd)

Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385 (folld)

Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494 (refd)

Tan Boon Liat @ Allen & Anor et al, Re; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors [1977] 2 MLJ 108 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 84, (1)

Federal Constitution arts 5(1), 42, (4)(b), (8), s 38 of the 11th Schedule

Indian Constitution art 72(1)

Laws of the Constitution of Pahang art 15

Rules of the High Court 1980 O 18 r 19

Reference from: Originating Summons No R2–24–26–01 (High Court, Kuala Lumpur)

Karpal Singh (Jagdeep Singh Deo, Gobind Singh Deo & Ram Karpal Singh with him) (*Karpal Singh & Co*) for the appellant/plaintiff.

Dato' Azhar Mohamad (Mohd Yusof Zainal Abiden, Dato' Mary Lim, Tun Abd Majid Tun Hamzah & Dato' Halim Aman with him) (Attorney General's Chambers) for the respondents/defendants.

Ahmad Fairuz CJ (Malaya): Juraimi bin Husin ('the plaintiff') had, together with two others, been convicted of murder and sentenced to death by the High Court at Temerloh. His appeal to the Court of Appeal and the Federal Court had been dismissed. On 30 June 1999, he petitioned for clemency to His Highness the Sultan of Pahang. His petition was rejected on 4 April 2001. On his application, the execution of the death sentence was stayed pending his recourse to the court over the constitutionality of the rejection of his clemency petition.

A By way of an originating summons filed in the High Court at Kuala Lumpur, he applied for several declaratory orders pertaining to the rejection of the clemency petition. The Pahang Pardons Board, the Public Prosecutor, Malaysia and the Government of Malaysia, the defendants in the originating summons, applied under O 18 r 19 of the Rules of the High Court 1980 for the originating summons to be dismissed on the sole ground B that the decision of the Pardons Board is not justiciable. During the hearing of the defendants' application, the plaintiff's counsel urged the court to remit the matter to the Federal Court under s 84 of the Courts of Judicature Act 1964 for that court to decide on the constitutional issues raised. The High Court, however, dismissed the plaintiff's application. The plaintiff C appealed to the Court of Appeal which unanimously allowed his appeal, set aside the High Court order, ordered the hearing of the originating summons in the High Court be stayed and directed the High Court to remit to the Federal Court under s 84(1) of the Courts of Judicature Act certain questions pertaining to the effect of arts 5(1) and 42(8) read with s 38 of the 11th Sch to the Federal Constitution. In compliance with the orders of the D Court of Appeal, the High Court remitted to us the following questions:

(i) whether the decision making process of that decision by His Royal Highness the Sultan of Pahang under art 15 of the Laws of the Constitution of Pahang, read together with art 42 of the Federal Constitution is justiciable, in particular as to whether or not there has E been a violation of s 38 of the 11th Sch to the Federal Constitution and art 5(1) of the Federal Constitution by reason of the time taken between the presentation of the clemency petition and that decision by His Royal Highness the Sultan of Pahang; and

(ii) if so, whether an inordinate delay between the presentation of that clemency petition and that of the decision by His Royal Highness the F Sultan of Pahang necessarily amounts to a contravention of s 38 of the 11th Sch to the Federal Constitution and art 5(1) of the Federal Constitution.

During the arguments before us, the plaintiff's counsel confirmed that he was not proceeding with the second question. As such, we heard the G submissions of both parties on the first question. After considering their submissions, we unanimously answered the first question in the negative and intimated that we would state our reasons for doing so in writing. We do so now.

At the outset of his submission, the learned counsel for the plaintiff H contended that the word 'law' in art 5(1) of the Federal Constitution includes procedure. For this, he relied on the Federal Court's decision in the case of *Re Tan Boon Liat @ Allen & Anor et al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108. The learned counsel conceded that there can be no I judicial review or justiciability of the decision of the Pardons Board on the merits. He, however, contended that the decision making process resorted to by the Board can be examined to consider whether it was in line with the

spirit of the relevant constitutional provisions. For this contention, he relied on the case of *Kehar Singh v Union of India* AIR 1989 SC 653 at pp 654–660. The learned counsel then urged us to consider whether arts 42(4)(b) and 42(8) of the Federal Constitution have been complied with by the Pardons Board. He pointed out that art 42(8) does not provide any time period as to when the Pardons Board must meet to consider and dispose of the clemency petition. However, according to counsel, art 160 and s 38 in the 11th Sch to the Federal Constitution necessitate the Board to meet with speed. Counsel argued that the inordinate delay between the presentation of the clemency petition dated 30 June 1999 and the decision making process leading to the rejection of the said petition on 4 April 2001 amounted to the contravention of s 38 in the 11th Sch, arts 5(1), 42(4)(b) and 42(8) of the Federal Constitution.

In his reply, counsel for the defendants argued that the power to grant pardon is bestowed upon the Sultan of Pahang by virtue of art 15 of the Laws of the Constitution of Pahang. This power is, according to him, a prerogative of mercy which is not amenable to judicial review. He referred us to the House of Lords' decision in the case of *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935 ('the *Civil Service Unions* case') wherein at p 956 Lord Roskill said:

> Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.

This *Civil Service Unions* case, urged counsel, had been referred to by our Supreme Court in the case of *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385, wherein Abdul Hamid CJ (Malaya) at p 386 said:

> In the present case though the Pardons Board tendered advice to the Yang di-Pertuan Agong but clearly Yang di-Pertuan Agong himself exercised the power in accordance with art 42(l) above read together with Reg 29 of the Essential (Security Cases) (Amendment) Regulations 1975. *In our view such power is a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amenable to judicial review.* (See *Council of Civil Service Unions & Ors v Minister for the Civil Service*). (Emphasis added.)

The learned counsel then drew our attention to the case of *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 wherein Abdul Hamid CJ (Malaya) said at p 67:

> Basically, the originating summons relates, at least indirectly, if not directly, to an issue concerning the process of clemency which is clearly non-justiciable.

Counsel further adverted us to the case of *Public Prosecutor v Soon Seng Sia Heng & Ors* [1979] 2 MLJ 170, wherein Suffian LP said at p 171:

A When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account, and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so.

B Finally, the defendants' counsel contended that the Supreme Court in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 had held that it was a fallacy to refer a decision of the Pardons Board to the court for consideration when in so doing it was indirectly impugning the decision and order of the King which was obviously non-justiciable. On the strength C of the authorities cited above, the learned counsel submitted that the grant of mercy or pardon is purely an act of grace on the plaintiff's plea for a favour or benevolence and the prerogative remains personal and exercised by His Royal Highness alone and that the exercise of the prerogative is not justiciable.

D One of the questions considered by the Indian Supreme Court in *Kehar Singh v Union of India* was whether judicial review extends to an examination of the order passed by the President of India under art 72 of the Indian Constitution. The relevant art 72(1) of the Indian Constitution reads:

E The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence:

(a) in all cases where the punishment of sentence is by a court martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union F extends;

(c) in all cases where the sentence is a sentence of death.

The Supreme Court at p 659 of the report said:

... we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru* G *Ram v Union of India* (1981) 1 SCR 1196 at p 1249 (AIR 1980 SC 2147 at pp 2174–2175). The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court. In *Special Reference No 1 of 1964* (1965) 1 SCR 413 at p 446 (AIR 1965 SC 745 H at p 763) Gajendragadkar CJ, speaking for the majority of this court, observed:

'... whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the judicature in this country the task of construing the I provisions of the Constitution ...'

This court in fact proceeded in *State of Rajasthan v Union of India* (1978) 1 SCR 1 at pp 80–81 (AIR 1977 SC 1361 at pp 1413–1414) to hold:

> '... So long as a question arises *whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court.* Indeed, it would be its Constitutional obligation to do so ... This court is the ultimate interpreter of the Constitution and to this court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of Law ...' (Emphasis added.)

Equivalent to the Indian art 72 is art 42 of our Federal Constitution which reads:

> (1) The Yang di-Pertuan Agong has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur and Labuan; and the Ruler or Yang di-Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State.

As to the power under art 42, the learned counsel for the defendants had earlier referred us to what our Supreme Court in the case of *Sim Kie Chon v Superintendent of Pudu Prison* had said at p 386 of the report. In fact, at the same page, the Supreme Court continued thus:

> ... Basically it is an executive power of the nature described by Suffian LP, delivering the judgment of the court in *Public Prosecutor v Lim Hiang Seoh* [1979] 2 MLJ 170. Sitting with four other judges, his Lordship said:
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> > '*When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account, and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them*; we have no jurisdiction to do so. The royal prerogative of mercy, as is recognized by its inclusion in Ch 3 of Pt IV of the Constitution, is an executive power as in Jamaica, *Hinds v The Queen*[[1976] 1 All ER 353].' (Emphasis added.)

Further on, at p 387, the Supreme Court said:

> In the present case the appellant's right ends after his appeal was dismissed by the Supreme Court and death sentence confirmed. Mercy begins but *mercy is not a legal right.* In the case of *Chiow Thiam Guan v Superintendent of Pudu Prison & The Government of Malaysia and Connected Appeals* [1983] 2 MLJ 116, it was held that a decision made pursuant to an exercise of a royal prerogative of mercy cannot be varied or confirmed there being no jurisdiction to do so. In our judgment *proceedings in Court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable.* By the same token a contention of any violation of the fundamental right which rests wholly on or dependent upon such an allegation is also not justiciable. It is our considered view that the power of mercy is a high prerogative exercisable by the Yang di-Pertuan Agong or the Ruler of a State or the Yang di-Pertuan Negeri, as the case may be, who acts with the greatest conscience and care and without fear of influence from any quarter (see *Hanratty and Another v Lord Butler of Saffron Walden* (1971) 115 Solicitors Journal p 386). (Emphasis added.)

A In stating that the power under art 42 of the Federal Constitution is not susceptible or amenable to judicial review, our Supreme Court was then relying on *Civil Service Unions*. Our Supreme Court and the House of Lords in *Civil Service Unions* had referred to this power under art 42 as the prerogative of mercy. And as pointed out to us by the learned defendants' counsel in the excerpt of Lord Roskill (quoted above) the prerogative of B mercy is amongst the powers that Lord Roskill thought not to be susceptible to judicial review because its nature and subject matter is such as not to be amenable to the judicial process.

About three years after the decision of our Supreme Court in the case of *Sim Kie Chon v Superintendent of Pudu Prison*, the High Court, Kuala C Lumpur was faced with an application by originating summons for a declaration that the public statement made by the Sultan of Selangor (which was reported in the English newspapers) that he would not pardon anyone sentenced to death for drug trafficking in Selangor is in violation of art 42 of the Federal Constitution. This is the case of *Karpal Singh*. In his application to strike out the originating summons, the Sultan contended, D inter alia, that the originating summons did not disclose any reasonable cause of action as the issue raised therein is not justiciable. The High Court, after referring to several authorities which included the case of *Sim Kie Chon v Superintendent of Pudu Prison* and the *Civil Service Unions* case held that, at p 67 (of *Karpal Singh*):

E > Basically, *the originating summons relates, at least indirectly,* if not directly, *to an issue* concerning the process of clemency which is clearly non-justiciable. (Emphasis added.)

The High Court then proceeded to hold the issue raised in the originating summons is not justiciable.

F In the light of the above mentioned authorities, we find it difficult to agree with the Indian authorities referred to in this judgment and by the plaintiff. To us, the effect of making the decision making process justiciable would, in the final analysis, make the decision itself to be held null and void. This would have the same effect as having the decision itself justiciable. Consequently, we are of the view that any attempt to make the decision G making process justiciable would indirectly make the decision itself justiciable. Hence we answered the first question in the negative.

Order accordingly.

Reported by Lim Lee Na

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